United States Court of Appeals

for the

District of Columbia Circuit

TRANSCRIPT OF RECORD

6-23 RJR

457 (3)

APPENDIX

UNITED STATES COURT OF APPEALS
For The District Of Columbia Circuit

No. 23,266

HARRY SHENK, et al.,

v.

THE ZONING COMMISSION OF THE DISTRICT OF COLUMBIA, et al.,

Appellants.

Appeal From The United States District Court
For The District Of Columbia

CHARLES T. DUNCAN,
Corporation Counsel, D. C.

HUBERT B. PAIR,
Principal Assistant Corporation Counsel, D. C.

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I N D E X

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 2316-68

HARRY SHENK, et al.,

vs.

THE ZONING COMMISSION OF THE
DISTRICT OF COLUMBIA, et al.,

CIVIL DOCKET

DATE			
1968			
Sep.	13	Complaint, appearance	filed
Oct.	4	Answer of defendants to complaint	filed
1969			
Apr.	18	Hearing begun; respited to April 21, 1969.	
Apr.	21	Hearing resumed; finding for the pltffs.	
Apr.	24	Judgment vacating order of the Zoning Commission of the District of Columbia and directing said Commission grant pltffs. application forthwith.	
May	23	Notice of appeal by Defts from order of 4/24/69	filed.

* * * * * * *

[Filed September 13, 1969]

COMPLAINT
For Mandatory Injunction and Other Relief

(1) This action is brought by and on behalf of Harry Shenk and Gertrude R. Shenk. Abraham Wolf and Henrietta Wolf, who are the owners of Lots 63 and 64 in Square 5877, containing approximately 41,472 square feet of unimproved property located in the District of Columbia, fronting on the 3000 block of Stanton Road, S. E.

(2) The jurisdiction of this Court is based upon Section 11-521 of the D. C. Code (1967 Ed.) by virtue of the nature of the proceedings herein and because the value of the real property, which is the subject matter of this Complaint, is in excess of $10,000 exclusive of interest and costs.

(3) The defendants constitute The Zoning Commission of the District of Columbia under D. C. Code Section 5-412 (1967 Ed.) as amended by Sections 404 and 501 of the Reorganization Plan No. 3 of 1967, and they are the successors to the previous Zoning Commission, the members of which were the three former Commissioners of the District, the Architect of the Capitol, and T. Sutton Jett, of the National Park Service, when the plaintiffs first filed their application with said Zoning Commission, and at the time of the initial hearing thereon, as will appear more fully hereinafter.

(4) On May 4, 1967, the plaintiffs filed an application in writing with the Zoning Commission of the District of Columbia, requesting an amendment of the Zoning map to change the zoning for said Lots 63 and 64 in Square 5877, from R-1-B to R-5-A. A copy of said application designated as Zoning Commission No. 67-26, is attached and incorporated herein by reference, and marked Exhibit A.

(5) At the same time, requests for similar amendments to the zoning map were filed by or on behalf of John D. Newman Properties, Inc., as owner of Lots 833, 837 and 880 in said Square 5877; by or on behalf of V. G. and M. C. Shelton, owners of Lots 845, 849 and 850 in said Square 5877; and by or on behalf of William J. Godwin, as owner of Lot 872 in said Square 5877. A copy of each of said applications is also attached and made a part hereof by reference, and marked as Exhibits B, C, D and E respectively.

(6) In addition, there was filed with the Zoning Commission a list of the names and addresses of the owners of all lots in the square block bounded by Stanton Road, 15th Place, Elvins Road and Sheridan Road, S. E., in which the plaintiffs' property is located, together with data relating to the size of each of the lots, and those owners of various lots therein who consented to or joined in the application requesting said

zoning amendment. Said list is attached and made a part hereof, and marked Exhibit F. The total area of all said lots listed therein amounts to 247,025 square feet, and the owners of lots containing a total of 145,535 square feet, have joined in the request for or have consented to such rezoning.

(7) Thereafter, and on or about August 5, 1967, plaintiffs were notified in writing that a public hearing would be held by the Zoning Commission in Room 500, District Building, beginning at 10 A. M. on Wednesday, September 6, 1967, for the purpose of considering proposed amendments to the Zoning Map from R-1-B to R-5-A, of Lots 63 and 64, in Square 5877, owned by the plaintiffs, and Lots 827, 837, 833, 880, 845, 849 and 850 in said square owned by others. A copy of said official notice dated August 4, 1967, is attached hereto, made a part hereof and designated as Exhibit G.

(8) On September 6, 1967, the Zoning Commission conducted a public hearing on said designated Case No. 67-26, and the following evidence was presented to and received by the Commission at that time:

(a) The Zoning Advisory Council, comprised of Arthur B. Hatton, Col. Tom Reynolds, and William McIntosh, who were appointed by the Commissioners of the District of Columbia, rendered their Report No. 2 unanimously recommending that said zoning applications be

granted. Said Council found that the effect of the zoning change would be to more than triple the development potential of this now largely vacant block from 60 single-family dwellings to approximately 180 garden-type apartments; that a change of circumstances had occurred which tended to validate the plaintiffs' contention that the present R-1-B family zoning is inappropriate; attention was called to the fact that the Zoning Commission had recently changed the zoning of three other blocks in the area to R-5-A, and that the block now under consideration represents one of only two blocks in the entire area that remain zoned for single-family residences; and the Council therefore recommended that the applications of the plaintiffs be approved in view of the fact that the subject property is largely vacant and represents a small isolated single-family zone surrounded by medium density multi-family zones. Said Council further recommended that lots to the north bounded by Elvins Road, Gainsville Street and Morris Road, and a 1.1 acre parcel bounded by Gainsville Street, 15th Place and Suitland Parkway (not owned by the plaintiffs herein), be also changed in order to achieve a consistent zoning pattern in the area and to obviate the need for a later change of the remaining property then zoned R-1-B. A copy of said Report No. 2 and Recommendation of the Zoning Advisory Council is attached hereto, and made a part hereof, designated as Exhibit H.

(b) Of the 247,025 square feet of the various lots located in the block involved herein, the owners of approximately 60% of the square footage contained in said block had consented to and/or had also requested the change in zoning from R-1-B to R-5-A.

(c) Lots 63 and 64 owned by the plaintiffs are adjoining lots, having a frontage of 47.60 feet each, but only on Stanton Road; Lot 63 has a depth of over 486 feet, and Lot 64 has a depth of 323 feet on one side, and 350 feet on the other side; and, although both Lots 63 and 64 cover an area of some 41,000 square feet, said property as it was then and still is zoned could only be improved by a single-family dwelling on each lot; that it is not economically feasible to improve said lots because of their size, the limited frontage, and the kind and type of neighborhood made up for the most part of vacant land and a limited number of old low-cost semi-detached brick and frame houses which had been in existence for many years, and valued at about $7,000 to $10,000 each.

(d) Other blocks in the same square and in the same general vicinity had recently been rezoned from R-1-B to R-5-A, and had been improved by moderate cost, garden-type multi-family dwellings, which have greatly improved the area and appreciated the value of the other surrounding properties; and that such an extension of the R-5-A

district would be orderly and in keeping with the predominate zoning in the vicinity of the subject property; that there is a serious housing shortage in the District of Columbia, particularly the moderate and lower cost housing, and the improvement of the property involved herein by multi-family housing units would tend to alleviate that problem. The plaintiffs filed with the Zoning Commission a map of a portion of the Square 5877 showing several square blocks and the zoning thereof in relation to the properties located in the block containing the lots herein involved; and a copy of said map is attached hereto, made a part hereof, and marked Exhibit I.

(9) Two residents of the square involved requested a postponement of the hearing in order to offer testimony in opposition to the pending application on the ground that they had not received sufficient notice of the proposed hearing; the Zoning Commission granted that request and ordered the hearing continued to December 6, 1967, to permit the filing of objections to the pending applications. On November 8, 1967, the Zoning Commission ordered a further postponement of the hearing to December 6, 1967.

(10) In the meantime, Reorganization Plan No. 3 of 1967 was promulgated and adopted. By the terms of Section 404 thereof, the functions of the members of the Board of Commissioners with respect

to serving as members of the Zoning Commission under D. C. Code Section 5-412, were transferred from the President of the Board of Commissioners to the Chairman of the District of Columbia Council, those of the Engineer Commissioner transferred to the Commissioner of the District of Columbia, and the functions of the other member of the Board of Commissioners were transferred to the Vice Chairman of the Council; with the result that the Zoning Commission became and was composed of the defendants named in the caption hereof; and under Section 503 of said Plan, the Board of Commissioners of the District of Columbia was abolished. On December 6, 1967, the newly-appointed Zoning Commission reopened the continued hearing in connection with the plaintiffs' application in said Case No. 67-26, at which time the following was presented at said hearing:

(a) Existing and proposed school construction to accommodate the future population which may be housed in the block containing plaintiffs' lots will be adequate, and there is adequate room for expansion of playground and recreation areas adjacent to the existing school buildings and in the general vicinity, if plaintiffs' application is granted and their property is developed accordingly.

(b) Plaintiffs' evidence, including exhibits, previously submitted at the hearing on September 6, 1967, were made a part of the record and, in addition thereto, it was established that the plaintiffs' property (Lots 63 and 64) had been reappraised by the Tax Assessor for the District of Columbia to a new and greatly increased assessed value of $20,000.00 for both lots; that it would be economically prohibitive to construct two single-family dwellings on these two lots, because such land values would require the construction of homes of the $50,000 to $60,000 category, and that it would be entirely unrealistic to assume that anyone would undertake to improve said lots with such high-priced single-family dwellings.

(c) Plaintiffs also established that the existing R-1-B zoning for the property in this block was at variance with the zoning of the major portion of the remaining blocks in said square; that eleven (11) surrounding squares or parts of squares on several occasions since 1963 have been rezoned from R-1-B to R-5-A; that the applications involved herein seek to conform the plaintiffs' property to the surrounding zoning and not to do so amounts to spot zoning by the Commission, as set forth in the report of the Zoning Advisory Council in this case; that the continuation of R-1-B zoning for said property would be discriminatory and would deprive the plaintiffs of their property without just compensation.

(d) In opposition, a person claiming to be a representative of the Fort Stanton Civic Association read a prepared statement claiming that the requested rezoning might create additional traffic hazards; that facilities for schools, recreation areas, police and fire protection would be inadequate, and he requested that the previous orders rezoning other property in the same Square to R-5-A be revoked and rescinded by the Commission. No evidence was offered to support those opposing plaintiffs' request for rezoning. Plaintiffs believe and aver that said allegations were merely conclusions, not based upon facts, and were highly conjectural or speculative.

(e) Thereafter, and in compliance with the Zoning Commission's ruling that further material could be submitted within ten (10) days thereof, plaintiffs submitted a Plat from the District of Columbia Surveyor's Office showing the dimensions and frontage of plaintiffs' Lots 63 and 64. A copy thereof is attached and made a part hereof, marked Exhibit J.

(11) Subsequently, and by letter dated December 20, 1967, addressed to plaintiffs' attorney, the Zoning Commission informed plaintiffs that it had voted unanimously to deny the applications for an amendment to the official zoning map. A copy of said letter is attached and made a part hereof and marked Exhibit K.

(12) On or about May 6, 1968, plaintiffs requested that the Commission reconsider its decision of December 20, 1967, and grant a new hearing, or in the alternative, that it set aside its decision and grant the plaintiffs' applications; and submitted therewith a composite plat depicting this property and the surrounding area as it relates to the zoning issue. A copy of said letter and a copy of said plat are attached and made a part hereof, marked Exhibits L and M.

(13) Thereafter, and by letter dated July 10, 1968, plaintiffs' counsel was notified by the Zoning Commission ". . . . that while they are sympathetic to your views, they are not prepared to reopen this case". A copy of said letter is attached and made a part hereof and marked Exhibit N.

(14) The Zoning Commission assigned no reasons for the denial of plaintiffs' applications and requests; its action in denying the rezoning of the subject property is believed to be contrary to substantial and uncontroverted evidence in the record, the decisions of the Commission were and are unreasonable, arbitrary, capricious, discriminatory, and contrary to law; by refusing to rezone the subject property, the action of the Zoning Commission constitutes the taking of property without due process in violation of the constitutional rights of the plaintiffs; the action of the Zoning Commission was contrary to law in that it failed to

state its reasons for the denial of plaintiffs' request for rezoning; in denying the applications in Zoning Commission File No. 67-26, its action was contrary to and in violation of the Zoning Commission's statutory authority to provide for zoning of the District of Columbia; that its denial was contrary to the general welfare in that it denied the logical development and use of the subject property for multi-family housing units. which is and will continue for some time to be required in the District of Columbia to help relieve the critical housing shortage.

WHEREFORE, the premises considered, plaintiffs respectfully pray:

(1) That the Court grant a mandatory injunction to the plaintiffs requiring the Zoning Commission of the District of Columbia and its members to vacate the order of said Commission entered December 20, 1967. in the Zoning Commission File No. 67-26, and to require the Zoning Commission to rezone the plaintiffs' real property, as hereinabove described, from R-1-B to R-5-A.

(2) And for such other and further relief as to the Court may seem just and proper.

* * * * * * *

Monday, April 21, 1969

* * * * * *

OPINION OF THE COURT

THE COURT: This is an action brought by a property owner against the Zoning Commission of the District of Columbia to review and set aside a decision of the Zoning Commission which denied the Plaintiff's application for a change of zoning of certain property owned by Plaintiffs.

The property in question is located in Anacostia which is a part of the Southeast section of the city and is on Stanton Road. It consists of two lots which really form a single parcel. It is vacant property at this time. It is zoned in a class known as R-1-B which permits the use of the property solely for single family dwellings.

The applicants had sought a rezoning to Class R-5-A which would permit the construction on the property of apartments known as garden type apartments without elevators and only two or three stories high. This application, as stated, has been denied.

At the trial of this case counsel for the Plaintiff, in addition to submitting the file of the Zoning Commission pertaining to this matter and a transcript of a hearing on the applications before the Commission,

introduced extraneous evidence. No evidence was introduced on behalf of the Zoning Commission. Evidence, however, is admissible in these proceedings, and in that respect the procedure is different from an action to review decisions of the Board of Zoning Adjustment on applications for variances. Their reason for the distinction is that the latter are reviewed solely on the record before the Board.

Actions of the Zoning Commission, however, instead of involving purely administrative discretion, as is the case in Board of Zoning Adjustment, involves constitutional questions; namely, whether the action of the Commission is arbitrary and capricious as to amount to taking the property without due process of law. Extraneous evidence is always admissible on questions involving constitutional rights.

The scope of review, however, is very narrow in cases such as is now before the Court. The ultimate question to be determined is whether the action of the Zoning Commission was so arbitrary and capricious as to amount to taking the property without due process of law. Beyond that the Court may not go.

This Court had occasion to review these principles in some detail in American University versus Prentiss, 113 Fed. Supp. 389, 293 affirmed 94 App. D. C., 204, 214 Fed. 2nd, 283.

The Zoning Commission of the District of Columbia is composed not of any persons appointed as members of the Commission but consists of several Government officials who constitute ex officio members of the Commission. In addition to the Zoning Commission there is also another official body, namely, the Zoning Advisory Council, which consists of three members, one of whom is attached to the Zoning Commission as a permanent full time employee and therefore may be regarded as an expert on the subject.

The usual practice is to refer all applications for changes of zoning to this council for report and recommendation before hearing. In this instance the Zoning Advisory Council made a favorable recommendation and recommended approval of the application for rezoning. The council recognized that this would change to some extent their additional demands on community facilities in the area, particularly schools, parks, et cetera.

It stated, however, that "There are changes of circumstances which tend to validate the applicant's contention that the present R-1-B single family zoning is inappropriate. The Commission will recall when they recently changed the zoning of three other blocks in the area to R-5-A and the block now under consideration represents one of only two blocks in the area that remain zoned for single family residences."

The council summarized these recommendations as follows: "In view of the fact that the subject property is largely vacant and represents a small single family zone surrounded by medium density multi-family zones. it is recommended that the application be approved."

After a short hearing that was somewhat hurried perhaps because a number of applications were set for hearing at the same time, the application was denied despite the recommendation of the council without any opinion or giving any reasons for denial.

In a similar case decided a little over two years ago, Diedrich versus The Zoning Commission, this Court in its unreported opinion made the following observation: "It is to be regretted that the Commission, although it overruled a favorable recommendation of the Advisory Council and denied the application, gave no reasons for its decision. It would have been helpful but the law does not require it to do so."

The Court desires to reiterate this remark with some emphasis. By analogy the appellate courts not infrequently affirm judgments of trial courts without opinion but when the judgment of a trial court is reversed ordinarily some indication or the reason for the reversal is given so it would be very helpful if the Zoning Commission in declining to follow the favorable accommodation of the Advisory Council gave

some indication of its reasons and not leave the Court to try to guess or infer the reason.

The chairman of the Commission is the Commissioner of the District of Columbia and he is certainly able to call upon the Corporation Counsel for assistance in those matters.

This Court, in addition to hearing and examining the evidence, read the file and the transcript of the hearing before the Zoning Commission and has considered them very carefully in view of the fact that actions of the Zoning Commission may not be lightly set aside.

First we must consider the nature of the area. This area is in the section of Washington which is generally inhabited by persons of low economic level. Until recently, the entire area had been zoned and used solely for single family frame dwellings, the lots in question, however, being entirely vacant. Photographs that were introduced in evidence indicate that many of these dwellings are old and somewhat deteriorated and delapidated.

Several applications relating to property surrounding the property of the Plaintiff to change the zoning so as to permit the erection of apartments of a garden type have been granted and none have been denied. No reason has been given and none appears or is discernible for a different treatment of the Plaintiff's vacant property. Plaintiff's

property does become almost an oasis unless the zoning is amended. It is like spot zoning in reverse which is generally condemned.

Now it appeared at the hearing that the only reason urged by persons who are opposed to the application for the zoning was that there were insufficient schools and insufficient police and fire fighting facilities in this area. Naturally the answer to that objection is that the city must supply and enlarge and build new schools when the need arises and must increase its fire fighting and police protection in any area that needs it and as the population grows in that area.

Progress and growth cannot be stopped for the lack of facilities. It is putting the cart before the horse to say that because there are not enough governmental facilities in a particular area we will not commence to grow. To the contrary, the answer is to create facilities, build more schools, possibly build an additional police station -- in any event, increase the number of able policemen which, by the way, the city is doing at this time.

If I may change my metaphor to deny the application on the ground urged by the objectors, it is like letting the tail wag the dog. No other objection to the rezoning was interposed. It should be noted that similar objections were made to prior applications to rezone other property in the neighborhood and those objections were overruled and

the rezoning granted. The mere fact that there has been a change in the composition of the zoning due to a reorganization of the District of Columbia government is, of course, no justification for a difference in treatment of different property owners.

The Court felt duty bound in the absence of any statement or opinion by the Commission to seek some ground of possible justification and accordingly I addressed a question to counsel for the Zoning Commission whether the Zoning Commission felt that the granting of the prior applications sufficiently saturated the area so that they wished to leave what I have called a vacant oasis. With commendable candor counsel for the Commission disclaimed any such reason and none appears on the record.

It is a matter of common knowledge that the poorer neighborhoods in this city need more and better housing facilities. Rezoning to garden type apartments seems to permit the building of such housing on vacant lots; naturally it is in the direction of progress and in the direction of meeting needs for additional cheaper housing. In any event, the Court is unable to discern any justification for a difference in treatment in the adjoining properties and the Plaintiff's property, nor does it find any other factual justification for refusal to permit the erection of garden type apartments on this vacant property which now is zoned

only for single family dwellings, the area being zoned for old time frame buildings which have been built except to the extent to which garden type apartments are now being built.

Bearing in mind the limitations on the power of the Court, the Court nevertheless reaches the conclusion that the denial of the application for rezoning was arbitrary and capricious and therefore should be set aside as invalid and unconstitutional and an order in the nature of a mandamus should be rendered directing the Commission to grant the application for rezoning.

This opinion will constitute findings of fact and conclusions of law.

Counsel will submit a proposed judgn ent.

* * * * * *

[Filed April 24, 1969]

JUDGMENT SETTING ASIDE ACTION OF D. C. ZONING COMMISSION AND GRANTING MANDAMUS

This cause came on for hearing and thereupon, upon consideration of the findings and opinion of this Court which are incorporated herein by reference, and it appearing to the satisfaction of the Court that the plaintiffs herein are entitled to the relief sought by their complaint, it is by the Court this 22nd day of April, 1969,

ORDERED as follows:

(1) That the Order of the Zoning Commission of the District of Columbia in its file No. 67-26 entered December 20, 1967, denying the application of the plaintiffs herein which seeks to rezone plaintiffs' property known and described as Lots 63 and 64 in Square 5877, from R-1-B to R-5-A, be and the same hereby is vacated and set aside; and

(2) That said Zoning Commission and each of the members thereof be and they hereby are directed forthwith to grant plaintiffs' said application and to rezone plaintiffs' said property, Lots 63 and 64 in Square 5877, from R-1-B to R-5-A.

* * * * * *

[Filed May 23, 1969]

NOTICE OF APPEAL

Notice is hereby given that the Zoning Commission of the District of Columbia, Walter Washington, Gilbert Hahn, Jr., Sterling Tucker, J. E. N. Jensen, and J. George Stewart, defendants above-named, hereby appeal to the United States Court of Appeals for the District of Columbia Circuit from the final judgment entered in this action on the 24th day of April 1969.

* * * * * *

OFFICIAL TRANSCRIPT OF PROCEEDINGS

Friday, April 18, 1969

* * * * * *

[66] THE COURT: That is just it. Suppose the Commission was to come to the conclusion that existing schools could absorb a certain amount of growth but not too much growth and they would say, Well, we will grant three of these applications and deny the fourth. Would that necessarily be unreasonable?

MR. ALPHER: It would in these cases, Your Honor, and that was why I would like to argue from the three preceding files if I may. In doing so may I make reference to one of the exhibits?

THE COURT: Yes, indeed. You have a right to refer to anything that is in evidence.

MR. ALPHER: Looking at Plaintiffs' Exhibit No. 10, Your Honor, there is a document in there which purports to be a letter from the attorneys for the Applicants to The Zoning Commission and in the course of which appears this reference: "Mr. Tobriner raised the only question at the hearing and that was with respect to the impact of this application on the demand for school facilities."

[67] I wrote to Mr. Tobriner on February 3, 1967, and advised him that I have been informed by Mr. John M. Rex, Deputy Superintendent and Director of the Office of School Management and Supervision, that while the school situation in this area was "tight" that they were aware, however, that this is one of the most rapidly growing areas in the city and that in their six year plan for the future they anticipated that there would be adequate school facilities to meet the then need.

I come to the end of one portion of the argument. Then, Your Honor, I quote from one of the documents in the record identified as Plaintiffs' Exhibit No. 11. This is a letter also to the Commission from the attorneys for the Applicants, being Wilkes & Artis, dated February 3, 1967, and I quote:

> "At the public hearing on the above indicated cases, the Commission expressed an interest in the plans of the Board of Education for new schools in this area of the city. In an effort to give the Commission information of this type, we inquired at the offices of the Board of Education concerning its projections for new schools. We have been advised that the Board of Education recognizes this area of the city as one of the fastest growing areas from the standpoint of new re-
> [68] sidential construction and growing school population.
>
> "In recognition of this fact, the Board of Education has developed a firm six-year plan

> designed to adequately provide new schools to keep pace with new residential construction anticipated within this same six-year period of time."

Your Honor, there are two cases in which the Commission was advised and apparently uncontrovertedly so.

THE COURT: The Commission was advised of it in this case.

MR. ALPHER: They were because their attention was specifically called to these three cases in the record.

THE COURT: In other words, I am admitting the record in the other cases in order to show the decision in the other cases but I do not think the evidence introduced in the other cases, unless it was in and of itself, can be made part of the evidence in this case.

MR. ALPHER: Well, I submit it can, sir, because the opposition, if we may call it that, in our case in addition to opposing our application asked the Commission at the same time to reverse their decisions in these three cases that I am now quoting from.

THE COURT: I know, but were these records and files before The Zoning Commission in your case?

MR. ALPHER: I would not know if they were physically

[69] present at their meetings.

* * * * * *

MR. ALPHER: I tentatively agree.

If I may carry this further thought, and it is the identical thought that I just expressed, I then go to Plaintiffs' Exhibit 9 which is one of the cases we have relied upon as precedent. There is a letter also in 1967 so Your Honor can see how recent is this treatment of the school problem. 1967, the very year in which we made our application, and this is a letter to Congressman Gilbert Gude from the Commission.

"To The Honorable Gilbert Gude, U. S.
House of Representatives, Washington, D. C.

"Dear Mr. Gude: In reply to your letter of March 20, 1967, the zoning case which you referred to was considered at a public hearing on February 1, 1967, and in the Executive Meeting of March 21, 1967. Mr. Russell L. Paxton submitted on behalf of the Fort Stanton area a
[70] comprehensive brief long after the record for this public hearing was closed. However, I might add, the points raised by Mr. Paxton were also raised by other citizens at the public hearing, and the substance of his brief was discussed at the meeting.

"We are all cognizant of the critical need for decent dwelling units in Southeast Washington and the temporary burden that new housing in the area may impose upon the public schools. The Commissioners, when approving the request for rezoning, did so in the sincere belief that they should take action to increase the supply of decent moderately priced housing in Southeast Washington when the opportunity beckons and to continue to

> press for the construction of new schools, recreational facilities and other services needed by an expanding population or a radical population shift."

THE COURT: Who is this signed by?

MR. ALPHER: The President of the Board of Commissioners.

* * * * * *

[71] MR. ALPHER: Thank you, Your Honor. I have only one or two more sentences.

THE COURT: Take whatever time you need. This is an important matter.

MR. ALPHER: All right.

> "To do otherwise could well produce a stalemate in the development of the District of Columbia, and would delay indefinitely the possibility of providing vitally needed new construction.
>
> "In taking this action, we have notified Dr. Hansen" --

And Dr. Hansen, as Your Honor knows, was the Superintendent of Schools at the time.

* * * * * *

[72] "In taking this action, we have notified Dr. Hansen of our decision so that he will be aware of the advent of new housing in this critical area and press even harder than he has for new school construction grants in Southeast Washington."

* * * * * *

BRIEF FOR APPELLANT

UNITED STATES COURT OF APPEALS
For The District Of Columbia

No. 23,266

HARRY SHENK, et al.,

v.

THE ZONING COMMISSION OF THE DISTRICT OF COLUMBIA, et al.,

Appellants.

Appeal From The United States District Court
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CHARLES T. DUNCAN,
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I N D E X

SUBJECT INDEX

CASES CITED

DISTRICT OF COLUMBIA CODE, 1967, CITED

ZONING REGULATIONS OF THE DISTRICT OF COLUMBIA

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* Cases and authority chiefly relied upon are marked by asterisks.

UNITED STATES COURT OF APPEALS
For The District Of Columbia

No. 23,266

HARRY SHENK, et al.,

v.

THE ZONING COMMISSION OF THE DISTRICT OF COLUMBIA, et al.,

Appellants.

Appeal From The United States District Court
For The District Of Columbia

ISSUE PRESENTED

Whether there is a rational basis for the decision of the Zoning Commission to retain the low density zoning classification of the property in question.

This case has not been before the Court on any prior occasion.

REFERENCES TO RULING

The oral opinion of the United States District Court for the District of Columbia is contained in the official transcript of proceedings of April 21, 1969, at pages 2-9; and in the Appendix at pages 13-20.

STATEMENT OF THE CASE

The Pleadings

Certain property owners sought in the court below a mandatory injunction requiring the Zoning Commission of the District of Columbia (hereinafter referred to as the Zoning Commission or the Commission) to change the zoning classification of their property from R-1-B to R-5-A[1] (A. 2).[2] It was alleged in the complaint that the Zoning Commission has, in recent years, granted applications for identical changes

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[1] The R-1 District is designed for one-family detached dwellings. R-1-B provides for a slightly higher density than does R-1-A. Sections 3101.1 and 3301.1 of the Zoning Regulations of the District of Columbia. The R-5-A District is designed to permit "* * * all types of urban residential development * * * of * * * low height and density * * *," including what is commonly referred to as garden-type apartments. Section 3105.1 of the Zoning Regulations of the District of Columbia.

[2] References to the printed appendix are designated "A", whereas references to the exhibits in the folders are designated "F".

of zoning of surrounding properties, and that the refusal to grant this request constitutes spot zoning, is arbitrary, capricious, and discriminatory, and is "* * * contrary to the general welfare in that it denied the logical development and use of the subject property for multi-family housing units, which is and will continue for some time to be required in the District of Columbia to help relieve the critical housing shortage." (A. 11-12.)

The matter came on for hearing before the court below sitting without a jury. The evidence before the court consisted of the complete record of the proceedings before the Zoning Commission, plus the records in three cases previously before the Commission pertaining to neighboring properties. At the conclusion of the hearing, the court rendered an oral opinion in which it held that the requested change in zoning should have been granted. The court stated that the objections of the neighborhood civic association that the already overburdened public facilities could not accommodate the higher density which the rezoning would create were not relevant because, it ruled, schools and other facilities would have to be built or otherwise expanded to meet the increasing need. The Court also noted that the land in question is vacant, that there is a housing shortage in the District of Columbia, and

apparently concluded, contrary to the conclusion of the Zoning Commission, that the granting of the application would better serve the overall needs of the residents of the District of Columbia (A. 13).

An order was entered on April 24, 1969, directing the Commission to grant the requested change in zoning (A. 20), and a timely notice of appeal followed on May 23, 1969 (A. 21).

The Facts

On May 4, 1967, an application was filed with the Zoning Commission on behalf of the appellees, Harry Shenk, Gertrude R. Shenk, Abraham Wolf, and Henrietta Wolf, owners of Lots 63 and 64, in Square 5877, to change the zoning classification of their property from R-1-B to R-5-A. Requests for identical relief on behalf of John D. Newman Properties, Inc., owners of Lots 833, 837, and 880, in Square 5877; V. G. and M. C. Shelton, owners of Lots 845, 849, and 850, in Square 5877; and William J. Godwin, owner of Lot 872, in Square 5877, were set forth in the same application.[3] (A. 3.)

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[3] The lawsuit, however, and, hence, this appeal, involves only Lots 63 and 64, which are owned by the Shenks and the Wolfs.

Thereafter the Zoning Commission, in executive session, agreed to hold a public hearing on the application, and the matter was scheduled to be heard on September 6, 1967 (F. 13). The hearing was commenced as scheduled, but was recessed and continued to another date upon representations of neighboring property owners that they had not received proper notice of the proceedings. Before a new hearing could be scheduled, the Government of the District of Columbia was reorganized, and the Commissioner of the District of Columbia, and the Chairman and Vice Chairman of the District of Columbia Council replaced the members of the former Board of Commissioners as members of the Zoning Commission. A de novo hearing before the newly constituted Zoning Commission was held on December 6, 1967.

The property involved is located in Square 5877, which is in the southeastern section of the District of Columbia. The portion of the Square in which the property is located is bounded by Elvans Road, Gainesville Street, 15th Place, and Stanton Road (F. 63). This area consists of 247,025 square feet, and the two lots involved consist of 41,472 square feet (A. 4). The property to the northeast, bounded by Morris Road, 16th Street, Gainesville Street, and Elvans Road, and the almost triangular parcel to the east, bounded by Gainesville Street,

Suitland Parkway, and 15th Place, is presently zoned R-1-B, whereas the remaining property in the immediate area is zoned R-5-A (F. 63). Counsel for the property owners represented to the trial court that in the area of his client's property, there have been eleven separate changes of zoning from R-1-B to R-5-A between 1963 and 1967. He produced files of cases previously before the Commission reflecting three of these changes. The first file, Exhibit No. 9, shows that the zoning of the property to the east, bounded by Gainesville Street, 16th Street, Frankfort Street, and 17th Place, was changed on March 21, 1967; the second file, Exhibit No. 10, shows that the zoning of the property to the north, bounded by Pomeroy Road, Erie Street, Elvans Road, and Stanton Road, was changed on April 25, 1967; and the third file, Exhibit No. 11, shows that the zoning of the property on the northwest corner of Frankfort Street and 17th Street was changed on March 21, 1967. The files were admitted in evidence for the limited purpose of proving that the changes were made in those cases, and not for the purpose of proving any fact that appeared in evidence in those cases (Trial Tr. 68, 77-78).

The two lots involved in this case are unimproved, as is much of the surrounding property. The Zoning Advisory Council of the District of Columbia, citing the recent changes of zoning in the area and the fact that a change in zoning of the entire portion of Square 5877 would

result in an increase of development from 60 single-family dwellings to 180 garden-type apartments, recommended that the application be granted (F. 33). The Citizens Zoning Advisory Committee made a like recommendation.

Mr. Shenk, one of the owners of the property, testified that the property is best suited for low-cost housing (F. 28). He estimated that the apartments to be constructed would be rented for around $85 to $100 per month (F. 31). A neighbor, however, testified that the average monthly rental for apartments in the area was $130 (F. 52).

The Fort Stanton Civic Association, through its president, Russell L. Paxton, submitted a lengthy, documented opposition to the granting of the application. The Civic Association represents the area bounded by the Fort Stanton Recreation Center on the north, Pomeroy and Stanton Roads on the west, Suitland Parkway on the south, and Bruce Place on the east (F. 34-35). The Association pointed out that there is a great need in this area for single-family dwellings of the low and middle-income range; that home ownership should be possible in all sections of the city; and that in the last five to ten years in the southeastern section of the city there has been a "90 to 100-percent ratio in apartment building over purchasable single and semi-detached

dwellings" (F. 35). The Association also submitted statistics supporting its contention that "[s]chools are overcrowded, recreation parks are limited, police service and firemen services are overtaxed and utilities are overloaded" (F. 37). Various residents of the area also appeared and expressed their concern regarding the overpopulation of the area, the lack of facilities to meet their present needs, and the lack of property zoned for detached and semi-detached homes as compared to the abundance of property zoned for garden-type apartments (F. 45-52).

On December 19, 1967, the Zoning Commission denied the application to change the zoning of the property, and on July 9, 1968, denied a petition for reconsideration of its decision (F. 8, 12).

SUMMARY OF THE ARGUMENT

The trial court erred in substituting its judgment for that of the Zoning Commission respecting the type of residential development which is appropriate for the area in question. In superimposing its views on those of the members of the Zoning Commission, it dismissed, as irrelevant, the very factors which the Congress has specifically directed the Zoning Commission to consider. The action of the trial court is also inconsistent with many prior pronouncements by this Court. Its decision should not, therefore, be permitted to stand.

ARGUMENT

There is in the record a rational basis for the decision of the Zoning Commission to retain the present zoning classification of the property.

The Congress has delegated to the Zoning Commission the responsibility of regulating "* * * the density of population, and the uses of buildings, structures, and land for trade, industry, residence, recreation, public activities, or other purposes, and for the purpose of such regulation said Commission may divide the District of Columbia into districts or zones of such number, shape, and area as said Zoning Commission may determine * * *." D. C. Code, § 5-413 (1967) (emphasis supplied.) In delegating this broad authority and important responsibility, the Congress has directed that

> "Such regulations shall be made in accordance with a comprehensive plan and designed to lessen congestion in the street, to secure safety from fire, panic, and other dangers, to promote health and the general welfare, to provide adequate light and air, to prevent the undue concentration of population and the overcrowding of land, and to promote such distribution of population and of the uses of land as would tend to create conditions favorable to health, safety, transportation, prosperity, protection of property, civic activity, and recreational, educational, and cultural opportunities, and as would tend to further economy and efficiency in the supply of public services.

> Such regulations shall be made with reasonable consideration, among other things, of the character of the respective districts and their suitability for the uses provided in the regulations, and with a view to encouraging stability of districts and of land values therein." (D. C. Code, § 5-414 (1967).)

A comprehensive zoning plan for the District of Columbia, commonly referred to as the Lewis Plan, was adopted in 1958. In the process of preparing this plan, many public hearings were held, and the zoning classification and use of every piece of property in the District was carefully scrutinized. Approximately five years later, the Zoning Commission began to entertain applications to change to R-5-A the R-1-B zoning classification placed on some of the property in the vicinity of the property in question. A number of these applications were granted, and some of the land involved has been developed, and some presently is being developed, with garden-type apartments. (F. 30.)

The property owners urged, and the trial court found, that these recent developments are sufficient to render the present zoning of the subject property inappropriate. Also urged by the property owners and accepted by the trial court was the argument that the change in zoning would be beneficial to the District of Columbia in that it would help relieve a housing shortage. Unquestionably both of these are important considerations, but they are not to be considered to the exclusion of all

others. Otherwise, every property owner in the District of Columbia, or at least in its southeastern section, would be entitled to the same type of zoning. This is particularly true if, as is expected, the population of the District of Columbia continues to increase.

The very factors which the Congress had directed the Zoning Commission to consider were dismissed out-of-hand by the trial court as being irrelevant and unimportant. Ignoring D. C. Code, § 5-414, supra, which specifically directs, among other things, that zoning "* * * shall be * * * designed to * * * promote such distribution of population and of the uses of land as would tend to create conditions favorable to health, safety, transportation, prosperity, protection of property, civic activity, and recreational, educational, and cultural opportunities, and as would tend to further economy and efficiency in the supply of public services," the trial judge opined:

> "Now it appeared at the hearing that the only reason urged by persons who are opposed to the application for the zoning was that there were insufficient schools and insufficient police and fire fighting facilities in this area. Naturally the answer to that objection is that the city must supply and enlarge and build new schools when the need arises and must increase its fire fighting and police protection in any area that needs it and as the population grows in that area.

> "Progress and growth cannot be stopped for the lack of facilities. It is putting the cart before the horse to say that because there are not enough governmental facilities in a particular area we will not commence to grow. To the contrary, the answer is to create facilities, build more schools, possibly build an additional police station -- in any event, increase the number of able policemen which, by the way, the city is doing at this time." (A. 18.)

The trial court apparently overlooked the fact that the Zoning Commission has no authority to build schools, police stations, and other community facilities, or to hire the necessary personnel to accommodate the many needs of the people in the area. The Zoning Commission would not be responsible to its public trust if it were to ignore the plight of the residents of any area by permitting a further overpopulation of an already overpopulated and depressed area under the assumption that others, over whom the Commission has no control, will, although they have not done so in the past, take the necessary measures to provide for the welfare of the inhabitants therein. Furthermore, such a stand would not comport with D. C. Code, § 5-414, supra. This Court cautioned in Lewis v. District of Columbia, 89 U. S. App. D. C. 72, 190 F. 2d 25 (1951), that

"* * * Congress has given considerable discretion to the Zoning Commission for the establishment of a comprehensive zoning plan, so that the public welfare may dominate the development of the capital city.

* * * * *

"* * * But the Zoning Commissioners are entitled to consider the entire situation in a particular locality. They need not close their eyes to such factors as the adequacy and good condition of existing buildings for the uses to which they are presently being put; the need of the community for those uses, the style and attractiveness of existing buildings, and the like. All of this is certainly relevant to the preservation of the values of surrounding property. * * *"

The specific problem of the lack of school facilities was involved in Josephs v. Town Board of Town of Clarkstown, 24 Misc. 2d 366, 198 N. Y. S. 2d 695 (1960), where the court, meeting the question head-on, stated (198 N. Y. S. 2d at 699):

> "It is all very well to speak generally of an absolute duty on the part of a municipality to supply necessary school, highway and other facilities as it grows and expands in population and as the need for increased facilities arises, but it is clear that the duty of a municipality in this regard will not bar it from the right to reasonably regulate and control the density of population in specified districts in the interest of public welfare and to avoid unnecessary hardship to individuals and taxpayers. The question should be and is

> whether or not the action of the municipal authorities is reasonable in a particular case."

Similarly, the court in Gruber v. Mayor and Township Committee of Raritan, 68 N. J. Super. 118, 172 A. 2d 47, 52 (1961), held that:

> "Thus, the fact that a primary concern of the governing body was the need for relieving the school problem does not vitiate the ordinance if it is otherwise consistent with a comprehensive scheme or plan. Further, one of the enumerated purposes of zoning is to prevent the undue concentration of population. It is reasonable to assume that in this respect the Legislature had in mind the increased burden on school facilities resulting from population concentration. * * *"

What the residents of the area were pleading for, in effect, was a moratorium on further expansion of the R-5-A district until the school, police, fire, recreational, road and other municipal facilities are expanded to satisfy the present needs of the residents, and until the present R-5-A zoned property is fully developed. Recent zoning changes, they point out, have resulted in an un-co-ordinated development with no clear showing of a need for more garden-type apartments. They pointed out that much of the R-5-A zoned property has not yet been developed, and that the supply of garden-type apartments is greater than the demand (F. 36). The opposite, however, is true with respect

to the demand for single-family detached and semi-detached homes (F. 35). In Lewis v. District of Columbia, supra, this Court approved as a "reasonable objective" the desire of the Zoning Commission to refrain from creating more commercially-zoned property in a particular area until the existing commercially-zoned property became more fully developed. Such an objective respecting R-5-A zoned property is just as reasonable.

The civic association submitted detailed statistics to support its assertion that municipal facilities are wholly inadequate to meet the present needs of the area. Its evidence regarding the overcrowded conditions in the schools, for example, revealed that, during the period ending three months prior to the filing of the application, the Moten Elementary School, located at Sixteenth and Morris Road, Southeast, was designed for 968 students, but currently enrolls 1,560. Approximately 130 students were being bussed to other areas of the city. The Douglass Junior High School, located at Pomeroy and Stanton Roads, Southeast, was designed for 932 students, but currently enrolls 1,209. The Ballou Senior High School, located at 3401 Fourth Street, Southeast, was designed for 1,150 students, but currently enrolls 1,365. The Anacostia Senior High School, located at Sixteenth and R Streets, South-

east, was designed for 1,000 students, but currently enrolls 1,500. All the schools located on the fringe of the neighborhood were likewise overcrowded (F. 38).

Although the Zoning Commission, being a legislative body, is not required to make findings of fact and conclusions of law,[4] it is apparent that it was impressed by the reasons advanced by the civic association in opposing the change of zoning. In a letter to the president of the association informing him of the denial of the application, the administrative officer of the Commission stated:

> "You will perhaps wish to convey this to the members of your Association, especially since the position they took significantly influenced the Commission in its decision." (F. 61.)

The property owners represented to the court that the same objections registered by the civic association were made to and rejected by the Zoning Commission in three prior cases. Assuming this to be true, it does not necessarily follow, as the property owners infer, that the decision is wrong in the present case. Each case must be judged on its own individual merits. Certainly, the facts presented to the

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[4] Diedrich v. Zoning Commission of the District of Columbia, 129 U. S. App. D. C. 265, 393 F. 2d 666 (1968); Gerstenfeld v. Jett, 126 U. S. App. D. C. 119, 374 F. 2d 333 (1967).

Commission in this proceeding are sufficient to justify a conclusion that, at least for the present time, the brakes must be applied to further high-density type zoning. The property in question, together with neighboring R-1-B zoned property, constitutes a large area. No showing has been made that this area cannot be developed in accordance with its present zoning. Perhaps the requested zoning would yield the property owners a larger return on their investment than is now possible, but, as this Court held in Lewis v. District of Columbia, supra, such a factor would not justify judicial interference.

The trial court paid only lip service to the well-settled principles of law enumerated in Village of Euclid v. Ambler Realty Company, 272 U. S. 365, 395 (1926); Gerstenfeld v. Jett, 126 U. S. App. D. C. 119, 374 F. 2d 333 (1967); Association for the Preservation of the 1700 Block of N Street v. Duke, 123 U. S. App. D. C. 5, 356 F. 2d 344, 345 (1966); and Lewis v. District of Columbia, supra, regarding the limitations placed upon the right of review. It cited, as one of its reasons for reversing the decision of the Zoning Commission, that "* * * the poorer neighborhoods in this city need more and better housing facilities" (A. 19). The accuracy of such a conclusion cannot be challenged, but it is for the Zoning Commission, not the trial court, to decide what type

of housing facilities, i.e., garden-type apartments, high rise apartments, single-family detached dwellings, or others, are appropriate for a particular area.

It takes no special expertise to appreciate the benefit that derives from having a reasonable diversity of residential housing. It is obviously poor planning to restrict one large residential section of the city to apartment house residents only. The residents of the area involved provided many reasons why the integrity of single-family zoning should be protected. They stated, for example, that not everyone wants to live in an apartment, that home ownership creates pride in an individual, and that it provides a less expensive place for a family to live following retirement (F. 49-51).

The facts of this case are strikingly similar to those in Diedrich v. Zoning Commission of the District of Columbia, 129 U. S. App. D. C. 265, 393 F. 2d 666 (1968), where this Court approved, sub silentio, the action of the same trial judge in refusing to disturb the contested action of the Zoning Commission in denying a like application to change the zoning from R-2[5] to R-5-A. As the briefs and appendix in Diedrich

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[5] The R-2 District is designated for one-family semi-detached dwellings. Section 3102.1 of the Zoning Regulations of the District of Columbia.

will show, the property there involved, which is located in the southeastern section of the District of Columbia somewhat south of the property here involved, was unimproved, consists of approximately 14 acres,[6] and borders Wheeler Road on the east and Savannah Street on the north. The property immediately east, west, and a portion of that to the north was zoned R-5-A. Also, there, as here, the Zoning Advisory Council and the Citizens' Zoning Advisory Committee recommended approval of the application. Although Diedrich was called to the trial court's attention, it made no effort to distinguish its inconsistent treatment of the two cases.

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[6] The property involved here, including all the R-1-B zoned property surrounding it, appears to be an even larger tract.

CONCLUSION

It is respectfully submitted that the decision of the Zoning Commission to retain the present R-1-B zoning classification is representative of the wishes of the residents of the area and is, in all other respects, consistent with sound zoning principles. The evidence before the Commission, considered as a whole and in light of the statutory criteria, demonstrates that the action of the Commission was not only not arbitrary and capricious, but that it was clearly correct. Consequently, the judgment of the District Court overturning the action of the Commission should be reversed.

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December 29, 1969

6-23 R/R
(3)

IN THE

UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 23,266

HARRY SHENK, et al.,

v.

THE ZONING COMMISSION OF THE
DISTRICT OF COLUMBIA, et al.,
Appellants

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

BRIEF FOR APPELLEES

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CASES CITED

*Cases and authorities chiefly relied upon are marked by asterisks.

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Appellants

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

ISSUE PRESENTED

In the opinion of the appellees, the issue presented is: Do the findings of the trial court support its judgment that the action of the Zoning Commission was arbitrary and capricious.

APPELLEES' COUNTER-STATEMENT OF THE CASE

While the property owned by the appellees herein consists of two lots, for all practical purposes it may be considered as one parcel comprising about one acre of ground, having a frontage of

only about 100 feet on Stanton Road, with a depth of about 480 feet. It is assessed for tax purposes at around $26,000.00 (F.27: Pltf's Ex. 2).[1]

One of the appellees testified before the lower court, without contradiction, that he examined the area in which the property is located; that the homes in the area could be described as "dilapidated homes, going to pot"; that most of them are frame houses, although one or two may be masonry; that they were quite old; and pictures of some of these homes were received in evidence (Trial Tr. 59-60, 62).

The Zoning Advisory Council, which (as the lower court found) "consists of three members, one of whom is attached to the Zoning Commission as a permanent full-time employee and therefore may be regarded as an expert on the subject", (A.15) recommended approval of the application for rezoning, stating that

> "The Council recognized that this will to some extent throw additional demands on community facilities in the area, particularly schools, neighborhoods, parks, sewers, and so on.
>
> "Although there has been a history of denials of similar applications since 1948, there are now changes of circumstances which tend to validate the applicant's contention that the present R-1-B single-family zoning is inappropriate. The Commission will recall when they recently changed the zoning of three other blocks in the area to R-5-A, and the block now under consideration represents one of only two blocks in the area that remain zoned for single-family residences.

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[1] References to "F." are to the folder; References to "A." are to the appendix.

> "Recommendation: In view of the fact that the subject property is largely vacant and represents a small isolated single-family zone surrounded by medium density multi-family zones, it is recommended that the application be approved." (F.4).

Evidence was introduced to the effect that eleven separate changes of zoning from R-1-B to R-5-A in the area surrounding the property here involved had been granted, and the government's files in three of these instances were received in evidence. The same Russel L. Paxton who read an unsworn statement before the Zoning Commission in the instant case used precisely the same argument in at least one of the three earlier cases mentioned (Trial Tr. 79).

The appellants offered no evidence in the trial court, and, consequently, the record is entirely silent as to the reasons, if any, which motivated the Commission to deny appellees' application for rezoning. However much appellants now attempt to embrace the lengthy unsworn statement of Mr. Paxton, the record is entirely devoid of any reason which would support the action of the Zoning Commission in denying the appellees' application for rezoning. It should be noted not only that the Zoning Commission made no findings and gave no reasons for its decision (although it had a legal right to act in that manner), but, also, that appellants had an opportunity before the trial court to offer evidence to support the action of the Zoning Commission in this regard. This they did not do.

SUMMARY OF THE ARGUMENT

The trial court was not substituting its judgment for that of the Zoning Commission. Plaintiffs did not request such relief.

Plaintiffs challenged the Zoning Commission's action as arbitrary and capricious. The trial court agreed that it was. The court's findings of fact and conclusions of law required this holding, and it is consistent with prior holdings of this Court.

ARGUMENT

The appellants had two opportunities to justify its action in denying the appellees' application for rezoning. In the first instance, while the Commission was not required to, it could have set forth the basis in the record for its decision. Having failed to do so, however, the Commission still had an opportunity before the lower court to justify its action: it could have offered testimony, either by or on behalf of its members, but it chose not to do so, despite the clear invitation by the lower court. Instead, appellants have relied on an unsworn statement offered by or on behalf of a Citizens Association, using the same arguments which had previously been used and submitted in connection with other cases in the same area where the action of the Zoning Commission had been diametrically opposite to its action taken in this case.

As stated by the lower court:

> "There was a man named Paxton who objected to every one of these rezonings. We do not know who he is except he got himself elected president of the citizens association. That is not a difficult task because the average citizen does not become very active in the citizens association. He opposed all the prior rezonings and was overruled by the prior Commission and then he comes along again here and finally he wins." (Trial Tr. 79).

The lower court specifically found that this section of Washington is inhabited by persons of low economic level; photographs introduced in evidence indicate that many of the dwellings are old and somewhat deteriorated and dilapidated; that although several applications relating to surrounding property to change the zoning so as to permit the erection of garden-type apartments have been granted and none have been denied, no reason has been given and none appears or

is discernible for a different treatment of plaintiffs' vacant property; that it would make a plaintiffs' property an oasis unless the zoning is amended; and that is like spot zoning in reverse which is generally condemned. To the argument urged by persons opposed to the application that there were insufficient schools and insufficient police and fire fighting facilities, the lower court stated that the answer is the city must supply and enlarge and build new schools when the need arises and must increase its fire fighting and police protection in any area that needs it and as the population grows in that area. Moreover, as the lower court held, progress and growth cannot be stopped for lack of facilities; and that the answer is that more schools and facilities must be provided. The lower court also found that the mere fact that a change occurred in the composition of the Zoning Commission is no justification for a difference in treatment of different property owners. In an attempt to seek some possible justification or rationale for the Commission's action, the lower court questioned appellants' counsel as to whether the Zoning Commission felt that the granting of prior applications sufficiently saturated the area so they desired to leave the plaintiffs' property as a so-called "vacant oasis"; but counsel for the Commission disclaimed any such reason and none appears on the record (A.19). Recognizing as a matter of common knowledge that the poorer neighborhoods need more and better housing facilities, the lower court found that rezoning for garden-type apartments appears to permit the building of such houses on vacant lots, and that it is in the direction of progress and meeting needs for additional cheaper housing to do so. In any event, the lower court found no justification for a difference in treatment in the adjoining properties and appellees' property; nor did the lower court find any factual justification for the Commission's action in this case, and it had no difficulty in concluding that the denial of the application for rezoning was arbitrary and capricious (A.20).

This case is quite similar to *Hazen v. Hawley*, 66 App. D.C. 266, 86 F.2d 217 (1936), in which this Court affirmed an order of the trial court which vacated one type of zoning and ordered another type. At the trial a number of witnesses were heard and documentary exhibits received. At the close, the trial court made extensive findings of fact and conclusions of law, including a conclusion that the zoning action was unreasonable, arbitrary and capricious. Significantly, two of the trial court's findings were that the area in which the property owner sought to build an apartment house was extensively occupied by hotels and apartment houses, and also that there was an extreme need for additional housing facilities in the city. Both of these findings have counterparts in the present case. Further, this Court held that while it was not absolutely bound by a chancellor's findings of fact, it would not distrub them on appeal unless upon an examination of the evidence this Court found them to be clearly wrong.

In *Leventhal v. District of Columbia*, 69 App. D.C. 229, 100 F.2d 94 (1938), this Court alluded in so many words to the above findings in *Hazen v. Hawley*, supra, to distinguish the Court's holding in *Hazen* from its denial of zoning relief in *Leventhal*. In the course of its opinion, the Court had occasion to say this:

> "In those cases and some others it has been held that the owner of a residence-zoned island or peninsula in a commercial-zoned sea, if he is seriously injured by the discrimination against him, may be entitled to complain of arbitrary and unreasonable action."

The appellees in the present case, owners of a single-family zoned island in a sea of garden-type apartment zoning, similarly complained, with all the more justification by reason of the fact that the Zoning Commission had but recently created the garden-type-apartment zoning sea in eleven separate prior cases.

Lewis v. District of Columbia, 89 U.S. App. D.C. 72, 190 F.2d 25 (1951) is cited by appellants on the matter of judicial interference in zoning decisions. But the opinion of this Court in that case, while approving the Zoning Commission's three stated grounds for its action, noted that "For different treatment of two tracts of property in the same locale is only discriminatory if the properties are similarly situated, and no reasonable grounds exist for differentiation." Applying this test to the present case proves the correctness of the trial court's action.

Again, in *Prentiss et al. v. American University et al.*, 94 U.S. App. D.C. 204, 214 F.2d 282 (1954), the extent of judicial review was examined by this Court; in the present case the trial court followed these approved principles.

Appellants cite *Diedrich v. Zoning Commission of the District of Columbia*, 129 U.S. App. D.C. 265, 393 F.2d 666 (1968) in an effort to show an inconsistent treatment of similar cases by the same trial court. But the facts in the two cases are not so "strikingly similar". Two of the most important differences are in the size of the areas involved, and in the enormity of the discriminatory treatment. In the first place, the present case concerns a parcel of one acre; in *Diedrich*, it concerned 14 acres. Secondly, *Diedrich* made no showing of a transformation of her property into an oasis by Zoning Commission action. In the present case, there is evidence of 11 separate rezoning actions surrounding the property. The trial court properly found it to be "like spot zoning in reverse, which is generally condemned." And finally, the trial court found itself unable to discern any justification for a difference in treatment in the adjoining properties and the plaintiffs' property.

CONCLUSION

It is respectfully submitted that the holding of the trial court to the effect that the Zoning Commission's refusal to rezone appel-

lees' property in line with that body's rezoning in 11 prior cases of property surrounding appellees' property was arbitrary and capricious, was correct. The judgment of the District Court should consequently be affirmed.

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November 24, 1969